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No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, IN SUPPORT OF JURISDICTIONAL STATEMENT

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Dated: February 1, 1988

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MOTION OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Lawrence E. Walsh, Independent Counsel, respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner and of the attorneys for respondents Olson and Dinkins has been obtained. The consent of the attorney for respondent Schmults has been refused.

Lawrence E. Walsh was appointed as Independent Counsel in the Iran/Contra matter pursuant to the Independent Counsel statute on December 19, 1986. On March 5, 1987, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter from the Attorney General pursuant to the Attorney

General's Independent Counsel regulation, 52 Fed. Reg. 7270 (Mar. 10, 1987), 9241 (Mar. 23, 1987), *codified at* 28 C.F.R. Parts 600 and 601. On August 20, 1987, the United States Court of Appeals for the District of Columbia Circuit held that Mr. Walsh and his Associate Counsel have legal authority to pursue their investigation of the Iran/Contra matter pursuant to the Attorney General's parallel appointment. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

Although the authority of Mr. Walsh as Independent Counsel in the Iran/Contra matter has been upheld on the independent ground of the Attorney General's parallel appointment, Mr. Walsh requests to be heard as *amicus curiae* in support of the constitutionality of the Independent Counsel statute because he believes that his appointment as Independent Counsel in the Iran/Contra matter can and should be upheld under the statute as well as under the Attorney General's regulation.

Mr. Walsh also submits this *amicus* brief in order to call attention to an important factor not implicated in Independent Counsel Morrison's investigation which further supports the constitutionality of the Independent Counsel statute. The Independent Counsel statute contains two criteria pursuant to which the Attorney General may initiate the appointment of an Independent Counsel: 28 U.S.C. § 591(b) requires the appointment of an Independent Counsel in certain matters involving specified high government officials, while 28 U.S.C. § 591 (c) provides that the Attorney General "may" call for an Independent Counsel in other matters "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." The instant appeals relate to an Independent Counsel appointed under Section 591(b), while Mr. Walsh was appointed under Section 591(c).

Where the Attorney General relies upon 28 U.S.C. § 591(c) in initiating the appointment of Independent Counsel as he did in the Iran/Contra matter, the appointment of an Independent Counsel is in no sense compelled by the Independent Counsel statute, but rather represents a voluntary decision by the Executive Branch to avail itself of the mechanism provided by the statute to guarantee the independence and integrity of a specific criminal investigation as to which the Department of Justice may have a conflict of interest. The availability of the option provided by 28 U.S.C. § 591(c), and the fact that the Executive Branch chose to avail itself of that option in the Iran/Contra matter, strongly support the constitutionality of the Independent Counsel statute.

Respectfully submitted,

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as Amicus Curiae

Dated: February 1, 1988

QUESTIONS PRESENTED

1. May a statute constitutionally provide that, upon application by the Attorney General, an Independent Counsel shall be appointed to conduct a criminal investigation, where the investigation involves specified high government officials, or where the Attorney General determines that the conduct of such investigation by the Department of Justice may involve a conflict of interest?

2. Pursuant to the Appointments Clause of the United States Constitution (Article II, Section 2, Clause 2), may such a statute provide that Independent Counsel shall be appointed and his jurisdiction defined by a court?

3. To safeguard the independence of the investigation, may such a statute constitutionally provide that Independent Counsel may be removed by the Attorney General only for cause?

4. Does the appointment of an Independent Counsel to conduct a criminal investigation of specific and limited scope, where the conduct of such investigation by the Department of Justice might involve a conflict of interest, fatally invade the President's responsibility under Article II of the Constitution to "take Care that the Laws be faithfully executed"?

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BRIEF OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

Amicus curiae Lawrence E. Walsh was appointed as Independent Counsel in the Iran/Contra matter pursuant to the Independent Counsel statute on December 19, 1986. On March 5, 1987, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter from the Attorney General pursuant to the Attorney General's Independent Counsel regulation, 52 Fed.

Reg. 7270 (Mar. 10, 1987), 9241 (Mar. 23, 1987), *codified at* 28 C.F.R. Parts 600 and 601. On August 20, 1987, the United States Court of Appeals for the District of Columbia Circuit held that Mr. Walsh and his Associate Counsel have legal authority to pursue their investigation of the Iran/Contra matter pursuant to the Attorney General's parallel appointment. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

Although the authority of Mr. Walsh as Independent Counsel in the Iran/Contra matter has been upheld on the independent ground of the Attorney General's parallel appointment, Mr. Walsh submits this brief as *amicus curiae* in support of the constitutionality of the Independent Counsel statute because he believes that his appointment as Independent Counsel in the Iran/Contra matter can and should be upheld under the statute as well as under the Attorney General's regulation.

Mr. Walsh also submits this brief in order to call attention to an important factor not implicated in Independent Counsel Morrison's investigation which further supports the constitutionality of the Independent Counsel statute. The Independent Counsel statute contains two criteria pursuant to which the Attorney General may initiate the appointment of an Independent Counsel: 28 U.S.C. § 591(b) requires the appointment of an Independent Counsel in certain matters involving specified high government officials, while 28 U.S.C. § 591(c) provides that the Attorney General "may" call for an Independent Counsel in other matters "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest."

Where the Attorney General relies upon 28 U.S.C. § 591(c) in initiating the appointment of Independent Counsel, as he did in the Iran/Contra matter, the appointment of an Independent Counsel is in no sense compelled by the Independent Counsel statute, but rather represents a voluntary decision by the Executive Branch to avail itself of the mechanism provided by the statute to guarantee the independence and integrity of a specific criminal investigation as to which the Department of Justice may have a conflict of interest. The availability of the option provided by 28 U.S.C. § 591(c), and the fact that the Executive Branch chose to avail itself of that option in the Iran/Contra matter, strongly supports the constitutionality of the Independent Counsel statute.

STATEMENT OF THE CASE

This Statement of the Case will briefly summarize the application of the Independent Counsel statute in the Iran/Contra matter.

On December 2, 1986, one week after the initial announcement of a Department of Justice investigation of the events that came to be known as the Iran/Contra matter, Attorney General Meese announced that he had concluded that he should apply for the appointment of an Independent Counsel. On December 4, 1986, the Attorney General filed an application for appointment of an Independent Counsel with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit. In his application, the Attorney General expressly determined that an Independent Counsel should be appointed pursuant to 28 U.S.C. § 591(c).

On December 19, 1986, the Special Division of the court of appeals filed an order appointing Lawrence E. Walsh as Independent Counsel in the Iran/Contra matter. Order Appointing Independent Counsel, *In re Oliver L. North, et al.*, Div. No. 86-6, Dec. 19, 1986. As re-

quested by the Attorney General, the Special Division authorized the Independent Counsel to investigate possible violations of federal criminal law by Oliver L. North, other United States Government officials, and individuals acting in concert with them. *Id.* at 1. The order of the Division clarified and to some extent broadened the subject matter scope of the investigation suggested by the Attorney General. *Id.* at 2.

On March 5, 1987, Attorney General Meese issued a regulation, 52 Fed. Reg. 7270 (Mar. 10, 1987), 9241 (Mar. 23, 1987), *codified at* 28 C.F.R. Parts 600 and 601, which created an "Office of Independent Counsel: Iran/Contra" and provided that office with the same jurisdiction and powers that it already possessed under the Ethics in Government Act and the December 19, 1986 court order appointing Independent Counsel. The Attorney General stated that his purpose in issuing the regulation was "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. at 7271. The Attorney General emphasized that "this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." 52 Fed. Reg. at 7270-71.

Oliver L. North sought to test the legal authority of Independent Counsel by refusing to comply with a grand jury subpoena calling for certain unprivileged information. The district court and the court of appeals held that Mr. Walsh and his subordinates have legal authority to pursue their investigation pursuant to the Attorney General's parallel appointment, regardless of whether they also have such authority pursuant to the Independent Counsel statute. *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987). A petition for a writ of certiorari to review this decision was denied by this Court on January 19, 1988. *North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[1]

The split decision of the panel of the court of appeals in this case is the first judicial decision to hold the Independent Counsel statute unconstitutional. All other courts that have considered this question, including the district court in this case, have upheld the constitutionality of the statute.[2]

As shown below, the decision of the two-judge majority of the court of appeals panel striking down the Independent Counsel statute conflicts with the principles repeatedly recognized in decisions of this Court. Accordingly, review by this Court is urgently called for.

POINT I

THE INDEPENDENT COUNSEL STATUTE IS A MEASURED AND BALANCED RESPONSE TO THE PROBLEM OF INSURING THE INTEGRITY OF CRIMINAL INVESTIGATIONS OF HIGH OFFICIALS

As Chief Justice Rehnquist stated in denying a motion for stay of the return of an indictment in *Deaver v. Seymour*, 107 S. Ct. 3711 (1987), an attack upon the

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[1] Independent Counsel Walsh is aware of, and concurs with, appellant's request that this Court consider the instant matter as a direct appeal pursuant to 28 U.S.C. § 1252. Should the Court decide, however, that 28 U.S.C. § 1252 is not applicable, Independent Counsel Walsh submits that the issues presented herein are of exceptional importance and justify this Court's exercise of its certiorari jurisdiction and expedited consideration on the merits.

[2] *See In re Olson*, 818 F.2d 34, 43 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987); *North v. Walsh*, 656 F. Supp. 414, 420 n.9 (D.D.C. 1987), *aff'd on other grounds*, No. 87-5058 (D.C. Cir. Oct. 1, 1987), *petition for cert. pending*, No. 87-1094; *Deaver v. Seymour*, 656 F. Supp. 900, 902 n.3 (D.D.C.), *aff'd on other grounds*, 822 F.2d 66 (D.C. Cir.), *stay denied*, 107 S. Ct. 3711 (1987); *Banzhaf v. Smith*, 588 F. Supp. 1498, 1504-08 (D.D.C.), *vacated on other grounds*, 737 F.2d 1167 (D.C. Cir. 1984) (*en banc*).

Independent Counsel statute must overcome "the presumption that an Act of Congress is constitutional." The two-judge majority of the court of appeals panel in the present case gave no weight to this presumption. It likewise gave no weight to the careful congressional consideration which gave rise to the Independent Counsel statute.

The enactment of the Independent Counsel statute stemmed from the experience of Watergate. *See Final Report of the Senate Select Committee on Presidential Compaign Activities*, 93rd Cong., 2d Sess. 80 (1974). Congress held lengthy hearings over a period of five years before enacting the Independent Counsel statute.[3] In the course of these hearings, Congress received extensive testimony in support of the constitutionality of such a statute, including testimony in 1977 from the Department of Justice.[4] Congress concluded that the Independent Counsel statute was both necessary and constitutional. *See* H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. 2-6 (1978); S. Rep. No. 95-170, 95th Cong., 1st Sess. 5-7 (1977).

[3] *See, e.g., Special Prosecutor: Hearings Before the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. (1973); *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 93rd Cong., 2d Sess. (1974); *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Committee on Government Operations*, 94th Cong., 1st Sess. (1975-1976); *Provision for Special Prosecutor: Hearings on H.R. 14476 et al. Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 94th Cong., 2d Sess. (1976); *Special Prosecutor Legislation: Hearings on H.R. 2835 and Related Bills Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. (1977); *Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Committee on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

[4] *See Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Committee on Governmental Affairs*, 95th Cong., 1st Sess. 14-27 (1977) (Testimony of John Harmon, Assistant Attorney General, Office of Legal Counsel).

The Independent Counsel statute which emerged from this careful process of congressional enactment and executive approval is a measured and balanced statute which is narrowly tailored to meet the critical problem which led to its enactment. The Executive Branch, in the person of the Attorney General, plays an indispensable role in the invocation of the Independent Counsel statute. An Independent Counsel cannot be appointed under the statute unless and until the Attorney General has applied for such an appointment, either on the ground (which the Attorney General invoked in the instant case) that there are reasonable grounds to investigate a possible violation of a federal criminal law by one of the high Federal officials and campaign officials listed in 28 U.S.C. § 591(b), or on the ground (which the Attorney General expressly invoked in the Iran/Contra matter) that "investigation . . . by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c).[5]

In addition to his crucial role in initiating the appointment of an Independent Counsel, the Attorney General is empowered to remove an Independent Counsel "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of

[5] The Attorney General's crucial role is underscored by the fact that the courts have held that the Attorney General's refusal to apply for appointment of an Independent Counsel is not subject to judicial review, *see, e.g., Dellums v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984) (*en banc*), and that the Special Division may not expand the jurisdiction of an existing Independent Counsel to include matters which the Attorney General has previously and specifically determined should not be pursued. *In re Olson*, 818 F.2d 34, 47-48 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987).

such independent counsel's duties." 28 U.S.C. § 596 (b)(1).[6] The court which appointed the Independent Counsel, by contrast, has no power of removal; its power is limited to that of terminating the Office of Independent Counsel on a finding that the work of the Office has been "completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." 28 U.S.C. § 596(c)(2).

In sharp contrast with the crucial role of the Attorney General under the Independent Counsel statute is the limited and passive role of Congress. Under the Independent Counsel statute, Congress has a role in five extremely limited respects. First, Independent Counsel may make public reports and send them to Congress. 28 U.S.C. § 595(a). Second, appropriate congressional committees retain oversight over Independent Counsel. 28 U.S.C. § 595(d). Third, Independent Counsel must advise the House of Representatives of substantial and credible information which may constitute grounds for impeachment. 28 U.S.C. § 595(c). Fourth, the Attorney General must provide a written response if a majority of members of either party of either House's Judiciary Committee requests the appointment of an Independent Counsel. 28 U.S.C. § 595(e). Fifth, the Attorney General must provide the Judiciary Committees with a report regarding a decision to remove an Independent Counsel. 28 U.S.C. § 596(a)(2).

None of these reporting and oversight provisions of the Independent Counsel statute in any way limits the powers of the Attorney General and the Independent Counsel under the statute, or aggrandizes any of those powers to

[6] Congress adopted this "good cause" standard for removal, at the suggestion of the Department of Justice, in order to conform the standard for removal of Independent Counsel to that applicable to members of independent agencies. S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982).

Congress. On the contrary, these reporting and oversight provisions are similar to those which are routinely imposed by statute upon the Attorney General himself.[7] Similar requirements are also typically imposed on other Executive Branch officials.[8]

The powers of the Special Division of the court of appeals which appoints Independent Counsel are likewise carefully circumscribed. As noted above, the Special Division has no role whatever unless and until the Attorney General has applied for the appointment of Independent Counsel. When such an application is made, the Special Division has the duty of appointing Independent Counsel and defining his prosecutorial jurisdiction. 28 U.S.C. § 593(b). The Special Division is likewise empowered to expand the jurisdiction of an existing Independent Counsel, 28 U.S.C. § 593(c), and to fill a vacancy in the office of Independent Counsel. 28 U.S.C. § 593(e). The Special Division also has responsibilities in connection with the termination of the work of an Independent Counsel, namely, to receive and consider publication of the final report of an Independent Counsel, 28 U.S.C. § 595(b), and, as noted above, to terminate the Office of Independent Counsel upon a finding that its work is complete or nearly complete. 28 U.S.C. § 596(b)(2). Finally, the Special Division has discretion to grant attorney's fees to certain subjects of an Independent Counsel's investigation, 28 U.S.C. § 593(g), and to review the removal of Independent Counsel by the Attorney General. 28 U.S.C. § 596(b)(3).

The Special Division of the court of appeals has no ongoing responsibilities with respect to the work of In-

[7] *See, e.g.*, 15 U.S.C. § 639(c); 18 U.S.C. App. § 13(a); 28 U.S.C. §§ 522, 529; 30 U.S.C. § 208-2; 42 U.S.C. § 2000aa-11(b); 50 U.S.C. App. § 1984(c).

[8] *See INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983) (imposition of "formal reporting requirements" on administrative agencies "lies well within Congress' constitutional power").

dependent Counsel. Contrary to the speculations of the majority of the panel below (*see* Slip Op. at 76), the Special Division receives no interim reports from Independent Counsel, and exercises no power of supervision or control.[9] Except for the carefully circumscribed functions summarized above, the court exercises no functions with respect to Independent Counsel.

Thus, under the Independent Counsel statute, the Attorney General retains a decisive role in the invocation of the statute and in the removal of Independent Counsel once appointed; the Legislative Branch has no functions other than reporting and oversight; and the responsibilities of the Judicial Branch are narrowly limited.

POINT II

THE INDEPENDENT COUNSEL IS AN "INFERIOR OFFICER" AND JUDICIAL APPOINTMENT OF INDEPENDENT COUNSEL IS EXPRESSLY AUTHORIZED BY THE APPOINTMENTS CLAUSE OF THE CONSTITUTION

The Independent Counsel statute authorizes the Special Division of the court of appeals, upon request of the Attorney General, to appoint an Independent Counsel. *See* 28 U.S.C. §§ 49(a), 593(b). This delegation of the appointment function to the Special Division is expressly authorized by Article II, Section 2, Clause 2 (the Appointments Clause) of the Constitution, which provides that the President:

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the

[9] With respect to Independent Counsel in the Iran/Contra matter, the district court expressly found that the Special Court has not interfered in the grand jury investigation. *In re Sealed Case*, Misc. No. 87-0139, at 9-10 (D.D.C. July 10, 1987), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988).

> Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments." (Emphasis added.)

The Appointments Clause divides the "Officers of the United States" into two categories: those principal officers who must be appointed by the President and confirmed by the Senate, and those "inferior Officers" whose appointment Congress may vest in the President alone, in the courts of law, or in the heads of departments. Notwithstanding Congress' determination to the contrary, the panel majority below held that the Independent Counsel is not an "inferior Officer," but rather a principal officer who must be appointed by the President and confirmed by the Senate (Slip Op. at 10-23).

In reaching this conclusion, the panel majority expressly rejected (Slip Op. at 16-17) this Court's long-established standard for identifying inferior as opposed to principal officers, under which "inferior Officers" are "officers inferior to those specially mentioned" in the Appointments Clause. *United States v. Germaine*, 99 U.S. 508, 509-10 (1879), *quoted in Buckley v. Valeo*, 424 U.S. 1, 125 (1976). Under this standard, the Independent Counsel is clearly an "inferior Officer," because she is not an officer specially mentioned in the Appointments Clause of the Constitution.

After discarding this Court's test, the majority of the court below then undertook what it described as a "functional interpretation" of the Independent Counsel's role in order to determine whether she is an inferior officer (*see* Slip Op. at 17-18). Contrary to the view of the two-judge majority below, such a functional assessment clearly leads to the conclusion that Independent Counsel is an "inferior Officer." The Independent Counsel's role is temporary, episodic, and explicitly limited by her man-

date from the Court. She is appointed only after the Attorney General has determined that specific statutory criteria have been met.[10]

The authority of Independent Counsel is likewise limited to that necessary to carry out the purpose of the statute. The statute provides Independent Counsel with "full power and independent authority" to exercise the investigative and prosecutorial functions of the Department of Justice (other than the Attorney General's authority to approve wiretaps under 18 U.S.C. § 2516). 28 U.S.C. § 594(a). The authority of Independent Counsel is limited, however, to "such independent counsel's prosecutorial jurisdiction established under this chapter," 28 U.S.C. § 594(a), and ceases when the investigation and prosecution of matters within that jurisdiction have been completed or substantially completed. 28 U.S.C. § 596(b). Moreover, 28 U.S.C. § 594(f) provides that Independent Counsel "shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."

The majority of the panel below likewise departed from the plain language and accepted interpretation of the Appointments Clause by holding that Independent Counsel cannot be an "inferior Officer" because there is no "superior officer" who can direct Independent Counsel in the fulfillment of her duties or who can remove Independent Counsel at will (Slip Op. at 20). This holding is simply inconsistent with the plain language of the Appointments Clause, which does not require that all

[10] Both the tenure of office and the scope of responsibilities are far more limited than a United States Attorney's continuing obligation to prosecute and defend all civil and criminal actions on behalf of and against the United States in the appropriate district, and the temporary appointment of United States Attorneys by the courts have been upheld under the "inferior Officers" clause. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

"inferior Officers" be subject to a "superior officer". The word "inferior" does not necessarily mean "subordinate to a superior"; it may (and more often does) mean "lower in place or importance" without meaning "subordinate".[11] No decision of this Court has held that an "inferior Officer" must be subordinate to the directives of a "superior officer", or must be removable at will.[12]

The further holding of the two-judge majority below that the Appointments Clause does not permit "inter-branch appointments" (Slip Op. at 20, 35-38) again reads into the Appointments Clause a restriction which its language does not express, and flatly conflicts with this Court's decision in *Ex parte Siebold*, 100 U.S. 371 (1880). In *Siebold*, the Court upheld a federal statute which authorized the circuit courts to appoint federal election supervisors, a classic function of the Executive Branch.[13]

[11] The 1785 edition of Dr. Johnson's dictionary demonstrates that "subordinate" was not the primary meaning of "inferior" at the time the Constitution was drafted; in order of preference, the definitions of "inferior" given therein were, first, lower in place; second, lower in station or rank of life; third, lower in value or excellency; and last, subordinate. S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced From Their Originals* (1785). *See also* 5 *Oxford English Dictionary* 49 (1933).

[12] To the contrary, the election supervisors whose judicial appointment was upheld by this Court in *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880), were not subordinate to or removable by any "superior officer", although they had certain reporting obligations to the chief supervisor of elections in each judicial district. *See* 16 Stat. 433-38 (1870). Moreover, this Court held in *United States v. Eaton*, 169 U.S. 331, 343 (1898), that a Vice Consul remains an "inferior Officer" even when he takes the place of the Consul, who is not an "inferior Officer": "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official."

[13] The majority of the panel below attempts to reconcile the result in *Siebold* with its view that "inter-branch appointments" are prohibited by suggesting that the election commissioners in *Siebold*

The Court there stated:

> "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution[.]
>
> • • • •
>
> But the duty to appoint inferior officers when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." 100 U.S. at 397-98.

Contrary to the suggestion of the panel majority (Slip Op. at 37-38), there is no "incongruity" about the appointment of Independent Counsel by a court. For example, as noted above, courts have long appointed and continue in certain circumstances to appoint interim United States Attorneys, free from any constitutional impropriety. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). Again, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate [criminal contempt] proceedings when the need arises." *Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124, 2134 (1987).[14] The real "incongruity" would arise if a court were to compel the Attorney General to select the prosecutor charged to conduct an investigation as to which the Department of Justice or the Attorney General himself has a conflict of interest.

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were really officers of Congress (Slip Op. at 20, 36-37). This suggestion finds no support in the *Siebold* opinion or in the 1870 statute which was before the Court in *Siebold*.

[14] Simply because the court below could imagine a parade of "incongru[ous]" horribles (*see* Slip Op. at 39-40) does not mean that Congress' sensible formulation in the Independent Counsel statute follows in that procession.

POINT III

THE LIMITATIONS UPON THE ATTORNEY GENERAL'S POWER TO REMOVE INDEPENDENT COUNSEL ARE CONSTITUTIONAL

The Independent Counsel statute authorizes the Attorney General to remove Independent Counsel, but "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). The majority of the court below held that these limitations upon the Attorney General's power to remove Independent Counsel are unconstitutional, and that under the Constitution the Attorney General must be absolutely free to remove Independent Counsel at any time for any reason (or for no reason at all) (Slip Op. at 42-58). Once again, the decision of the majority below reflects a rigid and erroneous view of separation of powers.

The majority relied principally upon *Myers v. United States*, 272 U.S. 52 (1926), *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), but those cases are inapposite. In *Bowsher* and *Myers*, the Court held unconstitutional statutes in which Congress reserved *to itself* power over the removal of officials: Congress itself possessed removal power in *Bowsher*, and the Senate possessed veto power over removals in *Myers*. In *Humphrey's Executor*, this Court *upheld* a statute which permitted the President to remove an Executive Branch official only for good cause. In the present case, Congress has not reserved to itself any power over the removal of Independent Counsel. Instead, as in *Humphrey's Executor*, Congress has merely enacted statutory standards regulating the removal of Independent Counsel by the Executive. Neither *Bowsher* nor *Myers* holds such standards unconstitutional.

The constitutionality of the limitations upon the power of the Attorney General to remove Independent Counsel is sustained by two distinct lines of authority in this Court. First, the Court has stressed the "sharp differentiation . . . between those who are part of the Executive establishment and those whose tasks resquire freedom from Executive interference," and has made clear that the latter are not constitutionally subject to removal at will by the President. *Wiener v. United States*, 357 U.S. 349, 353 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 626-32 (1935). The panel majority attempted to distinguish *Wiener* and *Humphrey's Executor* as cases involving quasi-judicial officials (Slip Op. at 46-47), but this Court did not so limit those decisions; instead, the Court spoke of "those whose tasks require freedom from Executive interference," a category which clearly includes Independent Counsel.[15] The limitations upon the power of the Attorney General to remove Independent Counsel are essential in order to safeguard the independence of Independent Counsel, and are therefore fully consonant with the Constitution.

Second, the limitations upon the Attorney General's power to remove Independent Counsel are constitutional for still another reason. As shown in Point II above, Congress has validly lodged the appointment of Independent Counsel in the Special Division of the court of appeals pursuant to the Appointments Clause of the Constitution. In *United States v. Perkins*, 116 U.S. 483, 485 (1886), this Court held that where the appointment of an official is lodged in an entity other than the President pursuant to the Appointments Clause, the "constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to

[15] Moreover, *Humphrey's Executor* involved a Commissioner of the Federal Trade Commission, which has enforcement as well as quasi-judicial responsibilities.

officers so appointed." *Perkins* was cited with approval even in *Myers v. United States*, 272 U.S. 52, 161 (1926), whose sweeping view of the Executive power of removal was subsequently disapproved by the Court in *Humphrey's Executor v. United States*, 295 U.S. 602, 626 (1935).

POINT IV

THE NAMING OF AN INDEPENDENT COUNSEL DOES NOT INVADE THE PRESIDENT'S CONSTITUTIONAL POWERS

The majority of the court below also held that any exercise of independent authority by an Independent Counsel constitutes an invasion of Executive Branch authority and impairs the Executive's ability to "take Care that the Laws be faithfully executed." The panel majority's rigid and absolutist view of the Executive Branch's power conflicts with the more modulated and functional approach this Court has taken.

This Court has regularly approved statutes which insulate some functions of inferior executive officers from direct Presidential supervision and control. In short, the mere fact that a function relates to others exercised by the Executive does not mean that every facet of that function must be under total executive control. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838), this Court held that Congress may "impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President." In *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), the Court held that Congress might free from direct Presidential control the members of the Federal Trade Commission, which exercises both enforcement and quasi-judicial responsibilities, because "[t]he commission is to be nonpartisan; and it must, from the

very nature of its duties, act with entire impartiality." In *Wiener v. United States*, 357 U.S. 349, 353 (1958), the Court again held that Congress may confer independence from Presidential control upon "those whose tasks require absolute freedom from Executive interference". Most recently, in *Bowsher v. Synar*, 106 S. Ct. 3181, 3188 n.4 (1986), this Court emphasized that nothing in its separation of powers analysis required "casting doubt on the status of 'independent' agencies."

The authorities relied upon by the panel majority are not to the contrary. In both *Bowsher* and *INS v. Chadha*, 462 U.S. 919 (1983), this Court rested its holdings on specific instances of congressional overreaching: the congressional ability to remove the Comptroller General in *Bowsher*, and the congressional attempt to legislate without bicameralism and presentment to the President in *Chadha*. In the present case, there is no such direct congressional role. The powers of Congress under the Independent Counsel statute, as noted in Point I above, are limited to standard reporting and oversight provisions. Congressional overreaching, the evil emphasized by the Court in both *Bowsher* and *Chadha*, is entirely absent here.

Where, as here, there has been no attempt to aggrandize the powers of Congress at the expense of the Executive, this Court's approach, as recognized by Judge Ginsburg in the dissent below (Slip Op. at 14-18), rests less on a formulaic labeling of functions as "executive" in nature, and more on a balancing of the justification for the legislation and its impact upon the functions of the Executive. For example, in *Nixon v. General Services Administration*, 433 U.S. 425 (1977), this Court held:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its

> constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-12 . . . Only where the potential for disruption is present must we determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U.S. at 443.

Similarly, in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), decided the same day as *Bowsher*, this Court clarified the separation of powers analysis applicable where, as here, there is some encroachment on one branch, but no transfer of function to another. The approach approved in *Schor* allows a court weighing a separation of powers challenge not only to consider the nature and extent of the intrusion, as the majority below did, but also the purpose the rearrangement is designed to serve. *Schor* specifically instructs courts to consider the "concerns that drove Congress to depart from the requirements of Article III." *Schor*, 106 S. Ct. at 3258.

When measured by the standards laid down by this Court, the independent status of Independent Counsel is clearly constitutional. Such independence is essential to avoid the conflict of interest which would result if the President were to seek to control criminal investigations and prosecutions involving himself and high officials in his administration. By avoiding grave problems of conflict of interest which would otherwise be unavoidable, the Independent Counsel statute enhances, rather than detracts from, the system of checks and balances established by the Constitution.

CONCLUSION

For all of the foregoing reasons, probable jurisdiction should be noted (or, in the alternative, a writ of certiorari should issue), and the case should be set down for expedited consideration and determination on the merits.

Respectfully submitted,

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